

SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1907

No. 1107

UNITED STATES, APPELLANT

EUGENE FRANK BOBEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

FILED MARCH 12, 1908
PROBABLE JURISDICTION NOTED MAY 12, 1908

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1107

UNITED STATES, APPELLANT

vs.

EUGENE FRANK ROBEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION**

No. 50676

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE FRANK ROBEL, DEFENDANT

INDICTMENT—Filed May 21, 1963

The Grand Jury Charges:

COUNT I

1. That there is and has been in effect since October 20, 1961 a final order of the Subversive Activities Control Board requiring the Communist Party of the United States of America to register with the Attorney General of the United States as a "Communist-action organization," as defined in Title 50, United States Code, Section 782.

2. That on or about August 20, 1962, the Secretary of Defense, pursuant to the provisions of Title 50, United States Code, Section 784(b), designated the Todd Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility, and thereafter notices of such designation were posted and continue to be so posted, by the corporation in conspicuous places about the plant.

3. That from on or about November 19, 1962 and continuously up to and including the date of this indictment, in the Northern Division of the Western District of Washington and within the jurisdiction of the Court, Eugene Frank Robel did unlawfully and willfully engage in employment in a defense facility, to wit, Todd

Shipyards Corporation, Seattle Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice of the said final order requiring the Communist Party to register with the Attorney General as a Communist-[fol. 2] action organization and with knowledge and notice that the said Todd Shipyards Corporation, Seattle Division had been and continues to be designated a defense facility by the Secretary of Defense, in violation of Title 50, United States Code, Section 784(a)(1)(D).

A TRUE BILL.

DANIEL M. NARODICK
Foreman

BROCKMAN ADAMS
United States Attorney

BRANDON ALVEY
Special Attorney, Department
of Justice

JAMES P. MORRIS
Special Attorney, Department
of Justice

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

[File Endorsement Omitted]

[Title Omitted]

MOTION TO DISMISS THE INDICTMENT—Filed June 6, 1963

Defendant above named hereby moves the court for an order dismissing the indictment in the above entitled case on the ground that it fails to charge an offense for the following reasons:

1. That the statute upon which said indictment is based, that is, Section 5(a) (1) (D) of the Internal Security Act of 1950, (50 U.S.C. Sec. 784(a) (1) (D)) is void on its face as a direct abridgment of the freedoms protected from Congressional interference by the First Amendment to the Constitution of the United States;

2. That the section is void on its face as a statute which without due process of law takes away, or purports to take away, property, particularly the property right of a person to enter into a contract for gainful employment, contrary to the provisions of the Fifth Amendment;

3. That the section is void on its face in that it is impossible to ascertain from the statute what conduct, if any, could, would, or does constitute a criminal act under it, and by reason of this vagueness as to what constitute the elements of the conduct purportedly prohibited by it, the statute deprives a person charged under it of due process of law contrary to the Fifth Amendment;

4. That the section on its face, and as applied in this [fol. 4] indictment, is void in that the alleged designation of the Communist Party of the United States of America as a "communist action organization"

(a) fails by so designating the Communist Party in administrative proceedings conducted without any notice

of any kind to the defendant to afford defendant notice, hearing or opportunity to be heard, and of the right of confrontation of witnesses, and cross examination with respect to an essential element of this indictment, thus depriving defendant of due process of law in violation of the Fifth Amendment; and

(b) fails to set forth or charge facts to be considered by the jury as to the nature of the Communist Party, and particularly as to whether the Communist Party is, in fact, a "communist action organization" as defined by the statute, thus depriving him of a jury trial on an essential element of the charge, in violation of the Sixth Amendment; and

(c) fails to allege or show that any reasonable relationship exists between a public or national interest which can be constitutionally protected and the means sought to be applied by this statute to protect such interest: that is, the administrative proscription of the Communist Party and the consequential proscription of defendant's freedom to contract for gainful employment as an alleged member of such political party.

5. The section on its face, and as construed and applied in this indictment, is void in that in designating Todds Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility

(a) the secretary of Defense acted without any notice to defendant and thus has deprived him of due process of law contrary to the Fifth amendment; and

(b) the Secretary of Defense has designated all employment within Todds Shipyards Corporation, Seattle Division, as prohibited to members of the Communist Party and thus has unreasonably and arbitrarily excluded, or attempted to exclude, persons from employment, without any relationship being shown, alleged, or existing between any lawful and constitutional objective and the means sought to achieve such objective, thus depriving defendant of due process of law in violation of the Fifth Amendment; and

(c) fails to provide for a jury determination of whether the employment of defendant involves any question of the security of a national defense establishment, thus de-

priving him of a jury trial on an essential element of the indictment, contrary to the provisions of the Sixth Amendment.

Dated this 5th day of June, 1963.

JOHN CAUGHLAN
Attorney for Plaintiff

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 50676

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE FRANK ROBEL, DEFENDANT

MEMORANDUM OPINION AND ORDER—October 4, 1965

The United States procured the indictment of Eugene Frank Robel in May, 1963 for an alleged violation of Section 5(a)(1)(D) of the Subversive Activities Control Act, 50 U.S.C. § 784(a)(1)(D). The indictment contains but one count which charges:

"COUNT I

"1. That there is and has been in effect since October 20, 1961 a final order of the Subversive Activities Control Board requiring the Communist Party of the United States of America to register with the Attorney General of the United States as a 'Communist-action organization,' as defined in Title 50, United States Code, Section 782.

"2. That on or about August 20, 1962, the Secretary of Defense, pursuant to the provisions of Title 50, United States Code, Section 784b), designated the Todd Shipyards Corporation, Seattle Division, Seattle, Washington, as a defense facility, and thereafter notices of such designation were posted, and continue to be so posted, by the corporation in conspicuous places about the plant.

"3. That from on or about November 19, 1962 and continuously up to and including the date of this indictment, in the Northern Division of the Western District of Washington and within the jurisdiction of the Court, Eugene Frank Robel did unlawfully and wilfully engage in employment in a defense facility, to wit, Todd Shipyards Corporation, Seattle Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice of the said final order requiring the Communist Party to register with the Attorney General as a Communist-action organization and with knowledge and notice that the said Todd Shipyards Corporation, Seattle Division had been and continues to be designated a defense facility [fol. 7] by the Secretary of Defense, in violation of Title 50, United States Code, Section 784(a)(1)(D)."

The subsection of the statute reads as follows:

"When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

"(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

* * *

"(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility."

Defendant promptly moved to dismiss the indictment on the ground that it fails to charge an offense for the reason that the statute upon which it is based is violative of Article I, Section 9, and of the First, Fifth and Sixth Amendments to the Constitution of the United States, and for the additional reason that the indictment fails to set forth and state certain essential elements of the offense charged.

Briefs supporting and opposing the motion were filed and oral argument had. Decision on the motion has been delayed, awaiting final decision in the cases of *Aptheker v. Secretary of State* (1964) 378 U.S. 500, and *United States v. Brown* (1965) 381 U.S. 437, involving similar issues.

Supplemental argument in letter form was submitted following the decision in said cases.

For the purpose of this motion certain pertinent facts alleged in the proceedings may be assumed as true. They are that Robel, a native-born citizen of the United States, approximately fifty-four years of age, has been employed as a shipyard worker at the Todd Shipyards for a period in excess of ten years. During that time he has been, [fol. 8] and still is a member of the Communist Party. On August 20, 1962, the Secretary of Defense designated Todd Shipyards as a "defense facility," within the meaning of the Act. Notices to that effect were posted conspicuously in the plant area. Ninety days later, on November 19, 1962, Robel's continued acts of employment, which remained unchanged and which apparently had been lawful up until this time, then became criminal. As can be seen from the indictment, no charge is made against Robel that he is an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party. No charge is made that he intends to promote strikes or engage in activities inimical to the security of the United States. The government argues that it does not have to prove these elements. All it has to prove, under the statute, are the following four facts:

- (1) An order of the Attorney General requiring the Communist Party of America to register as a Communist-Action group;

- (2) Designation of Todd Shipyards as a defense facility by the Secretary of Defense;
- (3) Knowledge on the part of Robel that the shipyard had been designated as a defense facility and knowledge that the Attorney General had ordered the Party to register; and
- (4) Membership of Robel in the Communist Party.

For the confluence of these four factors alone criminal guilt (supposedly) flows. In other words, it is argued that the defendant is criminally liable regardless of whether he is an active or passive member of the Party, regardless of whether he believes and subscribes to a [fol. 9] few, most, or all of the Party's aims, and regardless of whether he personally has any intent to act adversely to the government's interests.

Throughout its brief the government contends that membership in the Communist Party is not, without more, a crime. Nevertheless, the defendant here subjects himself to the full penalties of the statute unless he either relinquishes his employment with the shipyard or resigns from the Party. Giving up his employment, we may assume, would mean a severe hardship, possibly involving the loss of valuable seniority rights. Thus, the only financially acceptable choice is resignation from the Party, although he has the lawful right to be a member. But the government contends he does not have a right to continue working at the shipyard *and* remain a member of the Communist Party—this is a crime. It is a crime not because of anything Robel has done but because the large group of which he is a member has been administratively adjudicated to have certain unlawful purposes. If all of Robel's activities remain unchanged—except that he gives up his Party membership—then there is no guilt; no crime is committed. Still, the government contends that being a Communist is not criminal. Whatever the precise element that Party membership contributes to criminality it is undeniably the central fact upon which guilt will depend in this case. And when criminal guilt is dependent upon a person's association with a large class of people, questions of First Amendment freedoms and due process under the Fifth Amendment hover in the background, and the indictment must be strictly construed.

An examination of *Scales v. United States* (1961) 367 U.S. 203 and *Noto v. United States* (1961) 367 U.S. 290 in connection with the recent cases of *Aptheker v. Secretary of State* (1964) 378 U.S. 500 and *Brown v. United States* (1965) 381 U.S. 437 convinces me that the indictment does not charge an offense against the United States.

The government contends without reservation that the indictment need not allege nor prove the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes. It is true that the statute does not explicitly so provide or require. This omission may ultimately serve to render subsection 5 of the Act here under consideration (50 U.S.C. § 784(a)) unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State*, supra, at page 511, footnote 9. Certainly if this likely constitutional infirmity is to be overcome the requirements of active membership and specific intent must be deemed implicitly in the statute. *Scales v. United States*, 367 U.S. 203, page 220 and footnote 11, page 221.

The indictment does not charge specifically or by inference either of the essential elements of active and knowing membership nor specific intent and the government does not so contend.

The nexus of guilt between a group and one of its members must depend on links more numerous and more substantial than those charged by the government.

It is therefore ORDERED that the indictment be and is hereby DISMISSED.

DATED October 4, 1965.

WILLIAM J. LINDBERG
United States District Judge

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

[Title Omitted]

NOTICE OF APPEAL—Filed November 2, 1965

TO: JOHN CAUGHLAN
Attorney for Defendant
220 Second and Cherry Building
Seattle, Washington

COMES NOW United States of America, plaintiff herein, by and through its attorneys William N. Goodwin, United States Attorney for the Western District of Washington, and Gerald W. Hess, Assistant United States Attorney for said District and appeals from the Order of Dismissal entered in the above-entitled cause on October 4, 1965 by the Honorable William J. Lindberg, District Judge; which Order dismissed an Indictment in one count charging the defendant Eugene Frank Robel with violation of Title 50 U.S.C., Section 784(a)(1)(D), in that from on or about November 19, 1962, until the date of the Indictment, said defendant did unlawfully engage in employment in a defense facility while being a member of the Communist Party of the United States of America with knowledge and notice of a final order of the Subversive Activities Control Board requiring the Communist Party of the United States to register with the Attorney General of the United States as a Communist-action organization.

DATED this 2 day of November, 1965.

WILLIAM N. GOODWIN
United States Attorney

GERALD W. HESS
Assistant United States Attorney

Office address:

1012 U.S. Courthouse
Seattle, Washington
98104

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 50676

[Title Omitted]

ORDER GRANTING EXTENSION OF TIME FOR FILING THE
RECORD ON APPEAL AND DOCKETING THE APPEAL—
Filed December 14, 1965

IT APPEARING that good cause exists to continue the time for filing the record on appeal and docketing the said appeal in the above-entitled cause, and the parties through their respective counsel having orally agreed that an order extending the time for filing the record on appeal and docketing the appeal may be entered extending said time until January 31, 1966, it is hereby,

ORDERED that the time for filing the record on appeal and docketing the appeal in the above-entitled cause be extending to January 31, 1966.

DATED this 13th day of December, 1965.

WILLIAM J. LINDBERG
United States District Judge

Presented and Approved by:

GERALD W. HESS
Assistant United States Attorney

[fol. 17]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20705

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL, APPELLEE

MOTION TO CERTIFY THE CAUSE TO THE SUPREME COURT
OF THE UNITED STATES—filed February 9, 1966

The United States moves this Court to certify the above-entitled case to the Supreme Court of the United States pursuant to the Criminal Appeals Act, as amended (18 U.S.C. 3731) on the ground that the appeal herein from a Judgment dismissing an Indictment on the ground of the invalidity or construction of the statute, Section 5(a)(1)(D) of the Subversive Activities Control Act, 50 U.S.C. 784(a)(1)(D), should have been taken directly to the Supreme Court.

Respectfully submitted,

/s/ William N. Goodwin
United States Attorney/s/ Gerald W. Hess
Assistant United States Attorney

[fol. 18]

Points and Authorities

This is an appeal from the dismissal of a one-count Indictment which charges that the defendant Eugene Frank Robel unlawfully and wilfully violated Section 5(a) (1) (D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a) (1) (D), by engaging in employment from on or about November 19, 1962, up to and including the date of the Indictment in a defense facility, to wit, Todd Shipyards Corporation, Seattle, Division, while at the same time being a member of the Communist Party of the United States of America with knowledge and notice that the Subversive Activities Control Board had issued an order requiring said Communist Party to register with the Attorney General as a "Communist-action organization" as defined in Title 50, United States Code, Section 782, and with knowledge and notice that the Secretary of Defense had designated said Todd Shipyards Corporation, Seattle, Division, as a defense facility pursuant to the provisions of 50 United States Code, Section 784(b) and that said Todd Shipyards Corporation, Seattle Division, was still so designated. The Indictment also alleged that the final order requiring said Party to register as aforesaid had been in effect since October 20, 1961, and that the Secretary of Defense had designated, pursuant to the provisions of 50 United States Code, Section 784(b), on or about August 20, 1962, as a defense facility the said Todd Shipyards Corporation, Seattle Division, and that the corporation had thereafter posted in conspicuous places about the plant notices of such designation and that such notices continued to be so posted.

The defendant moved to dismiss the Indictment on the ground that it failed to charge an offense for the reason that the statute on which it was based violated Article I, Section 9, and the First, Fifth, and Sixth Amendments to the Constitution of the United States, and for the additional reason that the Indictment failed to state essential elements of the offense charged.

The District Court constructed Section 784(a) (1) (D) of Title 50 to require as essential elements of the offense that the defendant have active and knowing membership

in the Communist Party and that he also have specific intent to further the unlawful purposes of the Party; if not construed to make such activity and intent elements of the offense, the Court said that 50 U.S.C. 784(a) might be unconstitutional citing *Aptheker v. Secretary of State*, 378 U.S. 500, 511, and *Scales v. United States*, 367 U.S. 203, 220-221. The relevant parts of the memorandum opinion read:

The government contends without reservation that the Indictment need not allege nor prove the defendant was an active or participating member of the [fol. 20] Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes. It is true that the statute does not explicitly so provide or require. This omission may ultimately serve to render subsection 5 of the Act here under consideration (50 U.S.C. § 784(a)) unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State*, *supra*, at page 511, footnote 9. Certainly if this likely constitutional infirmity is to be overcome the requirements of active membership and specific intent must be deemed implicitly [sic] in the statute. *Scales v. United States*, 367 U.S. 203, page 220 and footnote 11, page 221.

The indictment does not charge specifically or by inference either of the essential elements of active and knowing membership nor specific intent and the government does not so contend.

The judgment of the District Court dismissing the Indictment necessarily depended upon the Court's construction of Section 784(a)(1)(D) of the statute as making essential elements of the offense the active or knowing membership of the defendant in the Communist Party and his specific intent to advance the unlawful purposes of the Party. It was equivalent to the sustaining of a plea in bar when the defendant has not been put in jeopardy, and the United States was entitled to appeal, and should have appealed, directly to the Supreme Court. *United States v. Sampson*, 371 U.S. 75; *United States v.*

Broverman, 373 U.S. 405; *United States v. Mersky*, 361 U.S. 431.

[fol. 21] For the foregoing reasons, this Court should certify the case to the Supreme Court of the United States, 18 U.S.C., 3731; *United States v. Blue*, 350 F(2d) 267 (C.A. 9).

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20705

[Title Omitted]

ORDER GRANTING MOTION TO CERTIFY A DIRECT APPEAL
TO THE SUPREME COURT OF THE UNITED STATES—
filed March 1, 1966

The motion of the United States to certify this cause to the Supreme Court of the United States, pursuant to the provisions of Title 18 U.S.C., Section 3731, having been submitted to the Court on February 21, 1966, and it appearing that the appeal taken herein to this Court on November 2, 1965 should properly have been taken directly to the Supreme Court of the United States for the reason that the Judgment of the District Court for the Western District of Washington, dated October 4, 1965, dismissing the Indictment, was based on the invalidity and construction of the statute upon which the Indictment was formed, that is, Section 5(a)(1)(D) of the Subversive Activities Control Act, Title 50 U.S.C., Section 784(a)(1)(D), it is therefore now

ORDERED that the motion of the United States is hereby granted and it is further ordered that the Clerk

[fol. 23] of this Court certify this case to the Supreme Court of the United States.

DATED this 28th day of February, 1966.

(Illegible)

Judges of the United States Court
of Appeals for the Ninth Circuit

Presented by:

/s/ Gerald W. Hess
GERALD W. HESS
Assistant United States Attorney

[fol. 25] [Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 26]

SUPREME COURT OF THE UNITED STATES

No. 1107, October Term, 1965

UNITED STATES, APPELLANT

v.

EUGENE FRANK ROBEL

Appeal from the United States District Court
for the Western District of Washington

ORDER NOTING PROBABLE JURISDICTION—May 16, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

